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No. 1269

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CENTRAL BANK AND TRUST COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

On Appeal From the United States District Court for the Eastern District of Kentucky

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JURISDICTIONAL STATEMENT

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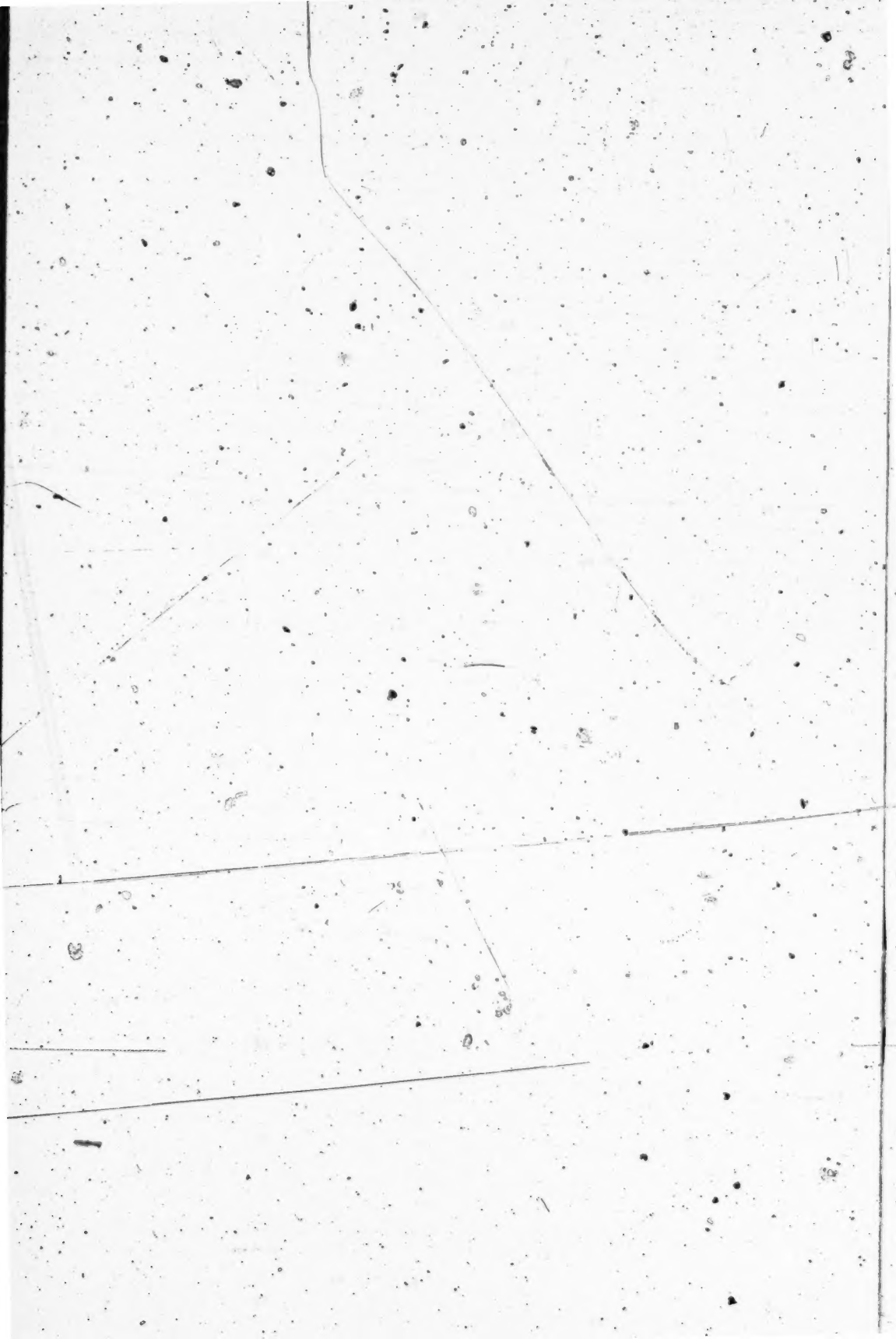

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement	4
The Questions Are Substantial	11
Conclusion	31

Appendix A	1a
Appendix B	2a
Appendix C	9a
Appendix D	10a
Appendix E	15a
Appendix F	15a
Appendix G	20a
Appendix H	22a

CITATIONS

CASES:

Battaglia v. General Motors Corp., 169 F. 2d 254 (2nd Cir.), *cert. denied*, 335 U.S. 887 (1948) 29

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 19, 20

Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967) 2, 14, 22

Chrysler Corp. v. United States, 316 U.S. 556 (1942) .. 16

Castner v. First Nat'l Bank, 278 F. 2d 376 (9th Cir. 1960) 26

Page

Laughlin v. Berens, 118 F. 2d 193 (D.C. Cir. 1940) 16
International Boxing Club v. United States, 358 U.S. 242 (1959) 18
Kozak v. Wells, 279 F. 2d 104 (8th Cir. 1960) 25
O'Donoghue v. United States, 289 U.S. 516 (1933) 28
Paramino Lumber Co. v. Marshall, 309 U.S. 370 (1940) 29, 30, 31
Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (19 How.) 421 (1856) 29, 30
Pope v. United States, 323 U.S. 1 (1944) 28
Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) 27
Schine Chain Theatres v. United States, 334 U.S. 110 (1948) 21
System Federation No. 91 v. Wright, 364 U.S. 642 (1961) 16, 30
United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945) 19
United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Calif.), aff'd *per curiam*, 19 L. ed. 2d 781 (1968) 13, 17
United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657 (E.D. Wis. 1962) 17
United States v. Chas. Pfizer & Co., 1965 Trade Cases ¶ 17,445 (E.D.N.Y. 1965) 19
United States v. Chicago Title & Trust Co., 10 F.R. Serv. 2d 731 (N.D. Ill. (1966)) 13
United States v. Crescent Amusement Co., 323 U.S. 173 (1944) 21
United States v. duPont & Co., 366 U.S. 316 (1961) 12, 18, 21
United States v. F. & M. Schaefer Brewing Co., 1968 Trade Cases ¶ 72,345 (E.D.N.Y. 1967) 17
United States v. First Nat'l Bank & Trust Co., 208 F. Supp. 457 (E.D. Ky. 1962) 5
United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964) 2, 5, 19, 23, 26
United States v. Grinnell Corp., 384 U.S. 563 (1966) ..19, 21
United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) .. 27
United States v. O'Grady's Executors, 89 U.S. (22 Wall.) 641 (1875) 28
United States v. Pan American World Airways, 1959 Trade Cases ¶ 69,300 (S.D.N.Y. 1959) 17

Page

United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) 26
United States v. Radio Corp. of America, 46 F. Supp. 654 (D. Del.), appeal dismissed, 318 U.S. 796 (1942) 17
United States v. Swift & Co., 189 F. Supp. 885 (N.D. Ill.) aff'd *per curiam*, 367 U.S. 909 (1961) 17
United States v. Swift & Co., 286 U.S. 106 (1932) 16
United States v. Third Nat'l Bank in Nashville, No. 86 O.T. 1967 (March 4, 1968) 30
United States v. Times Mirror Co., 274 F. Supp. 606 (C.D. Cal. 1967) 21

STATUTES AND RULES:

Bank Merger Act of 1966, Section 2(a), 80 Stat. 7 ..... 3, 4, 25, 27, 28, 30, 31
Expediting Act, Section 2, 15 U.S.C. § 29 2
Rule 24(a)(2), F.R. Civ. P. 14, 15
Sherman Act
Section 1, 15 U.S.C. § 1 ..... 2, 5, 26
Section 2, 15 U.S.C. § 2 ..... 2, 5, 8, 11, 25, 26
Section 4, 15 U.S.C. § 4 2

MISCELLANEOUS:

Affidavit of Leroy Miles in Opposition to Motion to Remand in No. 36, O.T. 1963 22
ATRR No. 336 (December 19, 1967) 15, 16
Brief for the United States in Nos. 4, 5, and 24, O.T. 1966 14
Brief for the United States in No. 36, O.T. 1963 21
Celler-Kefauver Act: Sixteen Years of Enforcement, Staff Report to Antitrust Subcommittee of House Committee on Judiciary, 90th Cong., 1st Sess. (1967) 12
H. Rep. No. 1221, 89th Cong., 2d Sess. (1966) 25

Page

Jurisdictional Statement in No. 590, O.T. 1962 ..... 12, 20

Memorandum for the United States in Opposition to Motion to Remand in No. 36, O.T. 1963 22

Moore's Federal Practice, Vol. 1B (2d ed. 1965) 26

Moore's Federal Practice, Vol. 4 (2d ed. 1967) 13, 15

Oppenheim, Federal Antitrust Legislation: Guidepost to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139 (1952) 17

S. 1312, 90th Cong., 1st Sess. 13

The Supreme Court 1966 Term, 81 Harv. L. Rev. 69 (1967) 13

White, Disturbing the Balance, 85 U. Pa. L. Rev. 678 (1937) 27

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. B, *infra*, pp. 2a-8a) is unreported. A district court opinion of February 1, 1967, in this case (App. F, *infra*, pp. 15a-19a) was incorporated by reference in the opinion below; it is reported at 263 F. Supp. 268. This Court has written two previous opinions in this case; they are reported at 376 U.S. 665 and 382 U.S. 34.

JURISDICTION

This is a civil antitrust action brought by the United States under Section 4 of the Sherman Act, 15 U.S.C. § 4, to enjoin violations of Sections 1 and 2 of that Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2.

The judgment (captioned "order") of the district court denying appellant-intervenor's motions that the court (a) not accept a proposed consent judgment, (b) reconsider its decision of February 1, 1967, and (c) grant the prayers for relief in appellant-intervenor's complaint (App. A, *infra*, p. 1a) was entered on December 29, 1967. On the same day the court entered appellees' proposed consent judgment (App. D, *infra*, pp. 10a-14a).

Appellant Central Bank and Trust Company—an intervenor in the court below—filed a notice of appeal in the United States District Court for the Eastern District of Kentucky on January 16, 1968.[1] The jurisdiction of this Court rests on Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. § 29. *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

STATUTES INVOLVED

(1) Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 2, provides in pertinent part as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the

[1] Dages I. Boyle, who also intervened in the court below, noticed a separate appeal on the same day. Boyle also has filed a separate Jurisdictional Statement in this Court.

> trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . .

(2) Section 2(a) of the Bank Merger Act of 1966, 80 Stat. 7, reads as follows:

> Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

QUESTIONS PRESENTED

(1) Whether the district court erred in entering a consent decree settling this litigation without the consent of appellant who had intervened in the proceeding as of right to oppose entry of the decree, and without affording appellant an opportunity, after it had become a party, to participate in relief hearings and settlement negotiations.

(2) Whether the district court erred in entering that consent decree in circumstances where (a) the facts developed at trial demonstrated to a high degree of probability that the challenged bank consolidation constituted a combination to monopolize in violation of Section 2 of the Sherman Act; (b) the consent decree does not require divestiture, and the court found that the relief it does provide effected "a ninety percent capitulation" to the defendants by the United States; (c) the court made no determination that the decree would protect the public interest in competition and

dissipate the harmful effects of the combination; and (d) the court ruled as a matter of law that it "should" enter the consent decree merely because there was "no showing of bad faith on the part of the United States" and its decision would likely be appealed to this Court.

(3) Whether Section 2(a) of the Bank Merger Act of 1966 violates the principle of separation of powers and is therefore unconstitutional insofar as it "conclusively presumed" to have been lawful under Section 1 of the Sherman Act a bank consolidation which, prior to enactment of the statute, this Court had found in violation of Section 1 and as to which the district court had entered a final decree of divestiture.

STATEMENT

This is an appeal from a judgment of the district court accepting in settlement of this case a consent decree jointly proposed by the defendants and the United States. Appellant intervened in the proceeding below for the purpose of moving that the court reject the proposed consent decree and require divestiture of the merged banks. The pertinent facts and background of the case are set forth below:[2]

(1) Appellant Central Bank and Trust Company ("Central") is engaged in the commercial banking business in Fayette County, Kentucky; it (and its predecessors) have been so engaged for more than twenty-five years. Prior to the consolidation of First

[2] The portions of the record cited in this Jurisdictional Statement are primarily contained in Volumes 8, 9 and 10. The clerk of the district court did not paginate the record consecutively; he numbered (in blue pencil) the first page only of each separate document. We identify cited documents by their "blue" numbers and title: *e.g.*, Doc. 222, Kincaid Affidavit, p. 5.

National Bank and Trust Company of Lexington ("First National") and Security Trust Company ("Security Trust"), Central competed with each of them in the obtaining of deposits and trust funds and the making of loans. Presently, Central endeavors to compete with the bank created by the consolidation, First Security National Bank and Trust Company of Lexington ("First Security"). (Doc. 222, Kincaid Affidavit, pp. 1-5.)

(2) This case began when the United States filed a complaint in early 1961 alleging that the consolidation of First National and Security Trust violated Sections 1 and 2 of the Sherman Act. After trial on the merits the district court dismissed both counts of the complaint. *United States* v. *First Nat'l Bank & Trust Co.*, 208 F. Supp. 457 (E.D. Ky. 1962). On appeal, this Court reversed, holding that "[w]here, as here, the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act." *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665, 672-73 (1964).

This Court's holding was based on subsidiary findings that in the commercial banking market in Fayette County, Kentucky (*id.* at 669)—

> [t]he bank established by the consolidation was larger than all the remaining banks combined:

	Assets	*Deposits*	*Loans*
First Security	52.70%	51.95%	54.20%
Citizens Union	17.06	16.78	16.41
Bank of Commerce.	12.99	13.32	14.46
Central Bank	9.14	9.66	8.85
Second National ...	8.10	8.30	6.09 [;]

that "[p]rior to the consolidation, First National and Security Trust had been close competitors in the trust department business," holding "[b]etween them . . . 94.82% of all trust assets, 92.20% of all trust department earnings, and 79.62% of all trust accounts"; that "the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there"; and that, as competitor banks testified, "the consolidation will seriously affect their ability to compete effectively over the years." The Court concluded, after appraising the above facts, that the violation of Section 1 of the Sherman Act was "clear." 376 U.S. at 669-70. Finally, the Court stated, "[i]n view of our conclusion under § 1 of the Sherman Act, we do not reach the questions posed under § 2." 376 U.S. at 673.

(3) The case was remanded to the district court to formulate an appropriate decree. The district court then entered a series of orders, on joint motions of the United States and the defendants, extending until February 16, 1965, the time within which the parties were to present an appropriate plan of relief (*e.g.*, Doc. 150-52, 159-62). On March 18, 1965, the district court, acting pursuant to a joint motion of the United States and the defendants, entered a judgment of divestiture. (App. G, *infra*, pp. 20a-22a.) This judgment was "clarified" by an order entered April 29, 1965,[3] which provided in part as follows (App. H, *infra*, pp. 22a-23a):

> Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, com-

[3] The order of clarification was entered upon defendants' motion, in which the United States "concurred" (App. H, *infra*, p. 22a).

> petitive and independent commercial bank which shall be the equivalent of the former Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington . . . .

No steps of record were taken by defendants to implement this decree of divestiture (see App. B, *infra*, p. 4a). The divestiture decree became final when defendants' time to appeal expired.

(4) More than nine months after entry of the clarification order, on February 21, 1966, Congress enacted the Bank Merger Act. Section 2(a) of the Act provides that:

> Any merger [or] consolidation . . . involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the [Sherman] Act . . . .

Thereafter, the United States moved in the district court for an adjudication that the consolidation of First National and Security Trust violated Section 2 of the Sherman Act (Doc. 202). In a supporting memorandum the Government "concede[d] that the statute [Bank Merger Act] is applicable to the merger of the defendants," and that it "creates a conclusive presumption that the merger did not violate Section 1 of the Sherman Act, and removes the legal support for the presently outstanding order of divestiture . . ." (Doc. 203, Memorandum of Plaintiff, p. 4).

Focusing on the combination to monopolize charge of its complaint, the United States contended that the Bank Merger Act "did not change the legal consequences of a violation of Section 2 of the Sherman Act" (*ibid.*, fn. omitted). It argued that the combination creating First Security was unlawful under Section 2 on two separate grounds. The narrower ground was "that to combine more than ninety percent of the assets held by corporate fiduciaries is to 'monopolize' the corporate trust administration market" (*id.* at 6). The broader ground was that the merger was a combination to monopolize the entire "commercial banking" market in Fayette County (*id.* at 5):

> "As a result of the merger, First Security (a) holds about 53 percent of the county's demand deposits, 46 percent of its commercial and industrial loans, 71 percent of its single-payment loans, and more than 88 percent of its FHA Title I loans; (b) has almost total control of trust service (more than 95 percent of the trust assets held by corporate fiduciaries in the county), which gives it a tremendous advantage in obtaining commercial banking business; and (c) is about three times as large as the next largest bank in the county, and has even greater supremacy over its other competitors. It is plaintiff's position that this tremendous strength and supremacy in this market constitutes monopoly power in any meaningful sense of the term.

The district court (on February 1, 1967) "overruled" the Government's motion, holding that "[s]ince the Supreme Court did not reverse the decision of this court on Section 2 of the Sherman Act, that ruling is the law of the case" (App. F, *infra*, p. 17a). The court observed that re-examination of the Section 2 decision

would be "questionable under any circumstance" and confusing to laymen (*ibid.*). As an alternative basis for its decision the court ruled that (*id.* at 18a)—

> it is my judgment that it was the intention of the Congress by the enactment of the Bank Merger Act to immunize this particular merger from all further attacks on the ground that it violated the law.

(5) The United States filed a timely notice of appeal to this Court and obtained several extensions of time for docketing the appeal (*e.g.*, Doc. 210-13, 231-32). Subsequently, on September 5, 1967, the United States and the defendants filed in the district court a stipulation that they had reached agreement upon a proposed decree to settle the Section 2 count. However, the United States reserved the right to withdraw its consent at any time within forty days. (App. C, *infra*, p. 9a.)

Ten days later, on September 15, 1967, appellant filed a complaint against defendants and applied for leave to intervene as a party plaintiff for the purpose of moving that the court (a) reconsider the issues concerning Section 2 of the Sherman Act, (b) not enter the proposed consent judgment, and (c) hold the Bank Merger Act unconstitutional and reinstate the March 18, 1965, divestiture decree (Doc. 216-18).

Appellant's central objection to the relief provisions of the proposed consent decree was that they would not dissipate the anticompetitive effects of the combination for—unlike the 1965 decree remedying the Section 1 violation—the new decree did not provide for divestiture. The substantive provisions of the consent judgment are injunctions prohibiting, for a period of

ten years, the acquisition of any other commercial bank in Fayette County, Kentucky (¶ III); limiting, for a period of five years, the number of branches First Security may establish (¶ IV); and prohibiting, for a period of ten years, the acquisition of any new non-testamentary trust business (¶ V), unless First Security's market share is first reduced to a stated percentage (¶ VI) (App. D, *infra*, pp. 12a-13a).

(6) After oral argument on appellant's motions the district court, on December 29, 1967, issued an order granting its motion to intervene and providing that the "plaintiff-intervenors' complaints, tendered on September 15, 1967 are ordered filed as of that date. . . ." The court, however, denied appellant's other motions as well as the prayers for relief in its complaint. (App. A, *infra*, p. 1a.)

While entering the proposed consent decree the court expressed serious concern about the adequacy of the relief provided in the decree and the Government's representation of the public interest in agreeing thereto. The court stated that although "[t]here has been no showing of bad faith on the part of the United States . . ." (App. B, *infra*, pp. 6a-7a)—

> I do seriously question its judgment in not permitting this case to go to a final decision by the Supreme Court. The plaintiff here had consistently taken the position that the action of these two banking institutions was unlawful and contrary to the public interest of the Lexington community. It was eventually sustained in this position by the Supreme Court. When the Congress sought to legislate the question by the enactment of the statute referred to, the United States again vigorously challenged the sufficiency of the statute to cover the issues presented by the record in this court. Its

> position was overruled and it proceeded to take an appeal. Suddenly, and I may assume without warning to anyone, the plaintiff makes about a ninety percent capitulation and now becomes the advocate of the merger.

The court recognized that the United States generally may compromise cases in which it is a party, but doubted the propriety of this particular compromise, coming as it did at an advanced stage of the litigation, after trial, and after this Court had found that the combination eliminated direct and substantial competition in "clear" violation of the antitrust laws (*id.* at 7a). Nonetheless, the court entered the decree because it believed that even in "cases of this magnitude" it could refuse to accept a consent decree only if bad faith had been shown and, in any event, an appeal to this Court was likely (*id.* at 7a, 8a).

Focusing on the other issues raised by appellant, the court ruled that the Bank Merger Act was constitutional, and it refused to rule on the Section 2 charges "for the reasons set forth in its opinion" of February 1, 1967 (App. B, *infra*, pp. 7a-8a).

(7) Soon after the district court's decision appellant noticed its appeal to this Court (Doc. 262), and the United States dismissed its appeal (Doc. 264).

THE QUESTIONS ARE SUBSTANTIAL

The judgment of the court below, entered with the agreement of the Government, perpetuates the consolidation of the largest and fourth largest banks in Fayette County, Kentucky—a consolidation which created a bank more than three times the size of its nearest competitor; larger than all other banks in Fayette County combined; and accounting for almost 95 percent of the corporate trust business in the area, as well

as 53 percent of the area's demand deposits. As the United States previously observed in this case, the Court has not been presented with an antitrust proceeding involving the combination of such direct and substantial competitors "since the railroad merger cases in the 1920's" (Jurisdictional Statement in No. 590, O.T. 1962, pp. 9-10, fn. omitted).[4] In these circumstances it is obvious that if the consent judgment is permitted to stand competition in commercial banking in Fayette County will be stifled for the foreseeable future. The decision below raises questions of marked importance concerning the power and duty of lower courts to refuse to approve consent decrees wherein the United States proposes—at the "crucial" "remedial phase" of important cases—to settle for less than adequate relief. See *United States* v. *duPont & Co.*, 366 U.S. 316, 322-23 (1961).

This appeal also raises an important question about the constitutional power of Congress to enact a statute which has the effect of vacating a final judicial decree. The issue concerning the insulation of final judicial decrees from retroactive encroachment by Congress is important not only to reaffirm a basic principle of constitutional law; it is also of immediate importance in enforcement of the antitrust laws. The precedent set by the banking lobby in obtaining enactment of the Bank Merger Act of 1966 shows signs of inspiring other groups toward a like course. For example, S.

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[4] The market shares held by the consolidated banks and the market concentration ratios involved in this case stand well among the highest of the more than 200 mergers challenged by the Government from 1951 through July 1, 1967. See *The Celler-Kefauver Act: Sixteen Years of Enforcement*, Staff Report to Antitrust Subcommittee of House Committee on the Judiciary, 90th Cong., 1st Sess., pp. 44-67 (Appendices B and C) (1967).

1312, 90th Cong., 1st Sess., presently pending before the Senate Committee on the Judiciary, if enacted, will require vacating of all final antitrust decrees granting relief against unlawful combinations of newspaper companies (Section 5(a)).

(1) The district court permitted appellant to intervene as of right in this proceeding, properly recognizing that its interests as well as the interests of the public were not adequately being represented by the United States (App. B, *infra*, p. 6a). At the same time it allowed intervention the court entered the consent decree which appellant had intervened to oppose (*id.* at 8a). This was plain error.

An intervenor has all the rights of an original party. 4 Moore's *Federal Practice* ¶ 24.16[b], p. 124 (2d ed. 1967). Among those rights is the right to prevent settlement by refusing to sign a "consent decree" terminating the litigation. "[A]n intervenor is a party for purposes of all future orders, and can appeal, raise new issues, *and prevent settlement.*" *The Supreme Court 1966 Term,* 81 Harv. L. Rev. 69, 223 (1967) (emphasis added).

This precise point has been utilized by courts to justify denial of intervention in specific circumstances. As one court recently put it (*United States* v. *Chicago Title & Trust Co.*, 10 F.R. Serv. 2d 731, 736 (N.D. Ill. 1966)):

> As [defendant] points out there can be no consent decree without consent . . . and should [the applicant] be permitted to intervene the consent of both parties would be lost.

See also *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 438 (C.D. Calif.), aff'd *per curiam*, 19 L.

ed. 2d 781 (1968). The Government itself, in its brief in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), acknowledged the same principle, arguing that " a successful intervenor, having the rights of a party, could block such a [consent] judgment and insist on a litigated proceeding" (Brief for the United States in Nos. 4, 5 and 24, O.T. 1966, p. 21). Continuing, the Government argued that (*id.* at 32-33, fns. omitted)—

> if appellants were improperly denied intervention, the relief proceeding in the court below must be reopened, and an adversary hearing held at which appellants will have the right to introduce evidence, to cross-examine the witnesses of the government and of the defendant and, if they are dissatisfied with the decree entered by the district court on the basis of the new hearing (a likely eventuality), to appeal to this Court.

The right of intervenors to prevent consent settlements accords fully with the purpose of Rule 24(a)(2), F.R. Civ. P., to allow intervenors themselves to protect interests which, as a practical matter, may be impaired or impeded by the original parties' disposition of the action.[5] Indeed, such protection may well be impossible absent that right. In this case, for example, appellant's ability to protect the procompetitive interests which motivated its intervention has been seriously circumscribed by entry of the decree at the same time that

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[5] Rule 24(a)(2) requires that intervention be permitted as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

its status as a party was adjudicated. While appellant may be bound by the consent decree (see 4 Moore's *Federal Practice* ¶ 24.16 [6] (2d ed. 1967)), appellant has never been afforded an opportunity, as a party, to participate in relief hearings and settlement negotiations leading to a decree calculated to protect its interests and the legitimate interests of all concerned. Under the lower court's decision appellant's sole right is the right to appeal and undertake to establish error in the proceeding below. By so limiting the efficacy of appellant's status as a party, contrary to the intendment of Rule 24(a)(2), the court erred.

(2) Independent of the argument in Point (1) above, the court below also erred by taking too narrow a view of its power to refuse to accept a plan of relief which is agreeable to the United States but will not promote the public interest. While it is important that courts not interfere unduly with the right of the Government to settle cases, that right cannot be allowed to obliterate the right of the public to effective relief against unlawful conduct. It is our position that where, as here, a trial already has been held and the facts establish to a high degree of probability that the consolidation constitutes an unlawful combination to monopolize, and that the competitive harm caused by the consolidation has been and will continue to be extensive and irreparable without divestiture, the court must reject Government efforts to settle the case on terms which will not fully dissipate the harmful effects of the consolidation.[6]

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[6] As the Assistant Attorney General in charge of the Antitrust Division remarked in a recent speech about consent decrees, "the Government normally should resolutely refrain from settling for anything substantially less than what it believes it would be entitled to secure after an adjudication in its favor" (Address by

(*a*) In a suit brought to vindicate an important public policy, entry of a consent decree is not solely a matter of compromise between the parties; it is a judicial act requiring careful scrutiny of the court. Before approving such a decree the court must satisfy itself that the relief promotes the statutory objectives and accords with sound equitable principles. *E.g., United States* v. *Swift & Co.*, 286 U.S. 106 (1932); *Laughlin* v. *Berens,* 118 F. 2d 193, 195-96 (D.C. Cir. 1940). As this Court recently stated in *System Federation No. 91* v. *Wright,* 364 U.S. 642, 652-53 (1961):

> The parties could not become the conscience of the equity court and decide for it once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute.

Moreover, the fact that the United States is one of the consenting parties in a suit brought to enforce a federal statute does not mean that its views necessarily define the public interest. Mr. Justice Frankfurter emphasized in his dissent in *Chrysler Corp.* v. *United States,* 316 U.S. 556, 570 (1942), that—

> [a] court of equity is not just an umpire between two litigants. In a very special sense, the public interest is in its keeping as the conscience of the

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Donald F. Turner before the Association of the Bar of the City of New York, December 13, 1967) (ATRR No. 336 (December 19, 1967), p. x-2). Focusing specifically on divestiture as opposed to an injunction against future acquisitions, he said (*ibid.*):

> [I]n my view such settlements are plainly inadequate in any case where the Government is convinced that the merger was unlawful, and where there has been no precipitous change in the defendant's circumstances that may arguably make divestiture a pointless gesture. A policy of giving every dog one bite would make an intolerable inroad on effective enforcement of anti-merger law.

> law. The circumstance that one of the parties is the Government does not in itself mean that the interest which it asserts defines and comprehends the public interest which the court must vindicate.

The courts, in short, "must act 'in accordance with their own conviction, uninfluenced by the opinions of any and every other department of the Government.'" *United States* v. *Radio Corp. of America,* 46 F. Supp. 654, 655-56 (D. Del.), appeal dismissed, 318 U.S. 796 (1943). See also *United States* v. *Brunswick-Balke-Collender Co.,* 203 F. Supp. 657 (E.D. Wis. 1962).

The settled rule governing antitrust settlements is that, prior to entering a consent decree, the court itself must determine that the decree is equitable under all pertinent circumstances and that it promotes the public interest protected by the antitrust laws—"the public interest in competitive economic activity." See, *e.g., United States* v. *Swift & Co.,* 189 F. Supp. 885, 905 (N.D. Ill.), aff'd *per curiam,* 367 U.S. 909 (1961); *United States* v. *Blue Chip Stamp Co., supra,* 272 F. Supp. at 434; *United States* v. *Pan American World Airways,* 1959 Trade Cases, ¶ 69,300 (S.D.N.Y. 1959); *United States* v. *F. & M. Schaefer Brewing Co.,* 1968 Trade Cases ¶ 72,345 (E.D.N.Y. 1967). See generally Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy,* 50 Mich. L. Rev. 1139, 1235 (1952).

In this case, the lower court entered the consent decree without affirmatively determining that the decree was equitable and in the public interest. Indeed, the court made findings which demonstrated that the decree was contrary to the public interest in competition, "seriously question[ing]" the judgment of the United States in agreeing thereto. It emphasized that this

Court had already found that "significant competition will be eliminated by the consolidation"; that the Government's agreement was a "ninety percent capitulation" to the defendants; and that, in entering into the agreement, the Government had become "the advocate of the merger." (App. B, *infra*, pp. 6a, 7a.)

Entering the decree despite the above findings, the court relied exclusively upon the following factors (*id.* at 7a, 8a):

> I may assume that the decision of this court will be reviewed by a higher court. . . .
>
> * * * * * *
>
> There has been no showing of bad faith on the part of the United States . . . .

In so ruling, the court below plainly erred as a matter of law. It had a duty not to enter the decree unless it could find that the relief would adequately restore the substantial competition eliminated by the consolidation. That duty was not performed by rubberstamping an inadequate decree to which the Government agreed in the exercise of good faith but poor judgment. Nor did the court perform its duty by passing along the issue to this Court. While decrees in antitrust cases have "always had the most careful scrutiny of this Court" (*International Boxing Club* v. *United States*, 358 U.S. 242, 253 (1959)), "the responsibility initially to fashion the remedy" has always been a duty of the district court (*United States* v. *duPont & Co.*, 366 U.S. 316, 323 (1961)).

(*b*) We demonstrate below that the consent decree entered by the district court manifestly is inadequate and inequitable, favoring the defendants at the expense

of the public. First, it is not only highly probable that the combination of First National and Security Trust violates Section 2 of the Sherman Act, it is almost certain. Secondly, considering the magnitude of that violation, divestiture is the only practicable remedy to restore the lost competition. Thirdly, the relief afforded by the consent decree is inadequate even when appraised solely within the decree's four corners.

(*i*) As this Court has found, First Security controls over 90 percent of all trust assets and earnings and almost 80 percent of all trust accounts in Fayette County. 376 U.S. 665, 669. Those facts alone demonstate that the consolidated bank has monopolized the county's corporate trust market. A combination monopolizing "any part" of commerce violates Section 2, and the existence of the requisite monopoly power "ordinarily may be inferred from the predominant share of the market." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). Moreover, as Judge Learned Hand opined in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 429 (2d Cir. 1945), it is hardly open to question that "to have combined ninety percent" of a market is to have monopolized that market.

The only legitimate issue as to trust services is whether they constitute a "part" of commerce within the meaning of Section 2. It is of course settled that even though the cluster of services constituting "commercial banking" is a relevant product market for antitrust purposes, corporate trust services considered separately may also be an economically significant part of commerce. *United States* v. *Grinnell Corp., supra* at 572; *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962); *United States* v. *Chas. Pfizer & Co.,* 1965 Trade Cases, ¶ 71,445, pp. 80, 948-49 (E.D.N.Y. 1965).

Corporate trust services standing alone constitute a relevant market because, in the language of *Brown Shoe, supra,* 370 U.S. at 325, they enjoy "public recognition . . . as a separate economic entity" and number "peculiar characteristics and uses" among their other unique attributes. In fact, the United States itself has so argued to this Court in this case (Jurisdictional Statement in No. 590, O.T. 1962, p. 19):

> [T]he undisputed facts show that corporate fiduciary services are often performed by institutions which are not commercial banks and that Security Trust was itself such an institution for many years; that corporate fiduciaries render a number of services not performed by individuals; that the only competition for Fayette County trust business in any realistic, commercial sense is among the county's commercial banks, since only the commercial banks advertise and actively solicit such business; that corporate fiduciaries have important characteristics peculiar to themselves, such as perpetual existence, specialized personnel, financial responsibility, government regulation, group judgment, constant accessibility, and impartiality; and that, indeed, Security Trust itself was originally organized by the businessmen of the community because of the need they had for a corporate fiduciary. It is also highly relevant that, in their analyses of this merger, both the Federal Reserve Board and the Federal Deposit Insurance Corporation discussed corporate trust business separately from commercial banking generally. [Citations omitted.]

Beyond this, it is highly probable that Security Trust's great dominance over all other banks in Fayette County renders the merger unlawful as a combination to monopolize all "commercial banking" services in that

area, as again the Government has repeatedly recognized (see Brief for the United States in No. 36, O.T. 1963, p. 55; Doc. 203, Memorandum for Plaintiff, p. 5).

(*ii*) Considering the merged bank's enormous market shares, divestiture unquestionably is the only practicable remedy to cure the competitive harm occasioned by the combination. Where the essence of an antitrust violation is a merger or acquisition it has long been recognized that even in a routine case adequate relief requires dissolution of the combination, for only then are the restraints upon competition dissipated and the defendants denied the benefits of their unlawful conduct. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 577 (1966); *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 128-29 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944); *United States* v. *duPont & Co.*, 366 U.S. 316, 326 (1961). "Divestiture has become the normal form of relief when acquisitions have been found to violate § 7 of the Clayton Act." *United States* v. *Times Mirror Co.*, 274 F. Supp. 606, 623 (C.D. Cal. 1967). That result is required *a fortiori* when a Section 2 violation of this magnitude is involved.

Indeed, the necessity for divestiture was recognized and advocated by the Government from the time it filed this case in March 1961 until it agreed to the September 1967 consent decree. As Government counsel argued to the district court in early 1965 (Doc. 182, Transcript of March 22, 1965, Hearing, p. 3):

> The government has consistently taken the position throughout this proceeding that recreation of a competitive entity to replace the one that disappeared as a result of the unlawful combination is the only effective relief in our view.

That statement echoed similar arguments previously made to this Court (Memorandum for the United States in Opposition to Motion to Remand in No. 36, O.T. 1963, p. 5):

> The violation charged in this case is an illegal combination of two banks. It would seem obvious that, if the combination is illegal, the only way to cure the illegality is to end the combination.

The district court's acquiescence in the Government's belated change of heart amounts to nothing more than the same sort of "knuckling under" which this Court deemed improper in *Cascade National Gas Corp.* v. *El Paso National Gas Co.*, 386 U.S. 129, 141 (1967).[7]

(*iii*) Analyzed solely on its own terms the consent decree entered by the court below is inadequate to protect the public interest. The decree (App. D, *infra*, pp. 10a-14a) contains three substantive provisions: Paragraphs III, IV and V. Paragraph III enjoins First Security for a period of ten years "from acquiring control over or merging with any other commercial bank having one or more offices in Fayette County, Kentucky" (*id.* at 12a). This prohibition is meaningless.

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[7] No argument can be made that divestiture is not possible or practicable. In fact, this Court has already rejected that precise argument. During the original appeal in this case defendants argued, after probable jurisdiction had been noted, that the case should be remanded to the district court to consider "problems of divestiture" (Affidavit of Leroy Miles in Support of Motion to Remand in No. 36, O.T. 1963, pp. 8-15). This Court denied that motion (376 U.S. 935 (1964)) after the United States opposed it and argued that the alleged problems would not be "insoluble" and that, in any event, "those problems relate to the form and method of divestiture, not to the need for it" (Memorandum for the United States in Opposition to Motion to Remand in No. 36, O.T. 1963, p. 6).

First Security, as a result of the consolidation, is larger than all remaining commercial banks in the area combined, holding over 50 percent of all bank assets, deposits and loans, over 90 percent of all trust assets and trust department earnings, and over 79 percent of all trust accounts. 376 U.S. at 668-69. There obviously is no commercial bank in Fayette County which First Security could acquire without running afoul of the antitrust laws. Paragraph III therefore amounts to no more than an inconsequential injunction not to violate the law.

Paragraph IV enjoins First Security "for five (5) years . . . from establishing any additional branch banking offices in Fayette County, Kentucky if, as a result . . . [it] would own or control more than one third of the total number of offices conducting a commercial banking business in Fayette County, Kentucky" (App. D, *infra,* p. 12a). This provision, if allowed to stand, will enable First Security to establish at least one additional commercial banking branch immediately (Doc. 218, Exhibit A to Central's Complaint, p. 6).

In addition, Paragraph IV was designed by the Government and the defendants to permit "First Security to expand and grow at the same rate for the next five years as it has during the past five years" (Doc. 222, Kincaid Affidavit, p. 5). Yet during all of the past five years the consolidation allegedly has been in violation of Section 2. To insure it of continuing its growth rate during those years is not to dissipate the unlawful effects of the consolidation, but, rather, is to assure that First Security will retain its overwhelming market dominance.

Paragraph V enjoins First Security for ten years from accepting new non-testamentary trust accounts,

except accounts of "any person (or spouse of any person) who is or at any time hereafter becomes an officer, director (including advisory directors) or employee of defendant First Security" (App. D., *infra*, p. 12a). This paragraph apparently is supposed to reduce First Security's almost total control of the market for trust department services. The provision is inadequate on its face, however, for it applies solely to non-testamentary trust accounts when "it appears that First Security's principal trust business is testamentary in nature" (Doc. 222, Kincaid Affidavit, p. 5).

Moreover, the provision contains a large loophole through which First Security can acquire a substantial amount of new non-testamentary trust business. This loophole is the exception for the accounts of advisory directors. Since the decree does not limit the number of such directors which First Security may appoint, it could validly name any number of persons as advisory directors in order to manage their non-testamentary trust assets.[8] Thus, Paragraph V is inadequate to dissipate the restraints on competition caused by the consolidation in both the testamentary and non-testamentary trust areas.

(*iv*) The district court's error in accepting this inadequate consent decree is in no way vitiated by the fact that, at the time the decree was entered, an order dismissing the Section 2 count of the complaint was outstanding in that court.[9]

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[8] Appointment of advisory directors by First Security would not be novel; the bank presently has a large number of such directors (Doc. 218, Exhibit A to Central's Complaint, p. 6).

[9] That order never became final because the United States filed a timely notice of appeal therefrom, which it dismissed only after the consent decree had been entered (see *supra*, pp. 9, 11).

First, the court's Section 2 decision (App. F, *infra*, pp. 15a-19a) was based upon technical considerations unrelated to the merits of the monopolization charge—*i.e.*, the court declined to re-examine the original decision dismissing the Section 2 charge (208 F. Supp. 457), and the court ruled that the Bank Merger Act was intended to absolve the defendants from all antitrust violations based upon the challenged combination. There would have been no inconsistency between those rulings and a determination, once the merits were considered, that the combination was in fact an egregious violation of Section 2 of the Sherman Act. In these circumstances, even assuming the correctness of the court's rulings, those rulings could not alter its duty to insist upon effective relief once the United States and the defendants decided to settle the case. Indeed, once the focus of the Section 2 litigation shifted from the illegality of the defendants' conduct to the propriety of a consent decree the court was bound, at the very least, to assume the validity of well pleaded allegations of the complaints. See *Kozak* v. *Wells*, 279 F.2d 104, 109 (8th Cir. 1960).

Secondly, the court's rulings are clearly wrong. Section 2(a) of the Bank Merger Act plainly and unequivocally states that it applies only to antitrust laws "other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2)." Indeed, the entire statute was "intended to make clear that no merger which would violate the anti-monopoly section (sec. 2) of the Sherman Anti-trust Act may be approved under any circumstances." H. Rep. No. 1221, 89th Cong., 2d Sess., p. 3 (1966).

Ordinarily, as a matter of comity, one district court should refrain from re-examining the judgments of

another district court. However, where exceptional circumstances make re-examination plainly essential to a proper result, a district court must undertake such a review in order to promote the orderly administration of justice. The court's failure to do so in the extraordinary circumstances of this litigation was error.

After the district court originally dismissed the Section 1 and Section 2 counts of the Government's complaint, the following events occurred: its judgment under Section 1 was reversed by this Court, which found a "clear" violation and deemed it unnecessary to reach the Section 2 issues; this Court clarified the standards applicable to bank mergers in *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), reversing the district court decision (201 F. Supp. 348 (E.D. Pa. 1962)) which had come down prior to the district court opinion in the instant case; Congress passed the Bank Merger Act of 1966; and appellant offered to present new evidence relevant to the Section 2 charge (Doc. 222, Kincaid Affidavit, pp. 3-5).[10] This collocation of circumstances makes clear that the original decision under Section 2 was rendered in a context that has long since disappeared; that decision should have been re-examined. *E.g., Castner v. First Nat'l Bank*, 278 F.2d 376 (9th Cir. 1960); 1B Moore's *Federal Practice*, ¶ 0.404[4], pp. 452-55 (2d ed. 1965).

(3) As noted above, this Court, in 1964, ruled that the merger of First National and Security Trust "constitutes a violation of § 1 of the Sherman Act." *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665, 673. The Bank Merger Act, enacted in 1966, "conclu-

[10] Some of the new evidence would have revealed First Security's potential control over Second National Bank and Trust Company of Lexington, one of the few remaining banks in the county.

sively presumed" that all bank mergers occurring before June 17, 1963 "have not been in violation of any antitrust laws other than Section 2 of the [Sherman] Act . . ." (§ 2(a)). Thus, Congress has determined that the merger of First National and Security Trust does not (and never did) constitute a violation of Section 1 of the Sherman Act, in effect vacating this Court's final judgment of illegality and the district court's March 1965 final decree of divestiture (see *supra*, pp. 6-7). It is our position that Section 2(a) of the Bank Merger Act, as applied to the instant combination, is unconstitutional, for in its enactment Congress "passed the limit which separates the legislative from the judicial power." *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 147 (1872).

Article III, Section 1 of the Constitution provides that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Judicial power differs from legislative power in that (*Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908))—

> [a] judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Under the Constitution the courts do not have any legislative power, and Congress does not have "*any* judicial power, all of it having been vested in the courts." White, *Disturbing the Balance*, 85 U. Pa. L. Rev. 678, 681 (1937).

Congress therefore cannot "subject the judgments of the Supreme Court to [congressional or any other] re-examination or revision. . . ." *United States* v. *O'Grady's Executors,* 89 U.S. (22 Wall.) 641, 648 (1875). Nor can Congress "set aside the judgment in a case already decided. . . ." See *Pope* v. *United States,* 323 U.S. 1, 9 (1944). These restrictions on the power of Congress to vitiate final judicial decrees are essential to protect the constitutionally established independence of the separate branches of Government—an independence which requires that all three branches be "restrict[ed] . . . to the exercise of their appointed power . . . ," and that "in reference to each other, neither of the departments 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.'" *O'Donoghue* v. *United States,* 289 U.S. 516, 530, 531 (1933).

Under the above principles Section 2(a) of the Bank Merger Act is unconstitutional, trenching upon the doctrine of separation of powers. Section 2(a) overruled this Court's final judgment declaring the merger of Security Trust and First National unlawful, and it did so after that final judgment of illegality had resulted in a final decree of divestiture. Thus, at the time the statute became operative, the Section 1 count of this case had been finally disposed of by the judiciary.

In making Section 2(a) inapplicable to bank merger cases in which final judgments had been rendered and divestiture already had been effected, Congress apparently recognized that the Constitution forbade it from interfering with the judicial process at that juncture. But there can be no constitutionally significant difference between a final judicial decree of divestiture

and a final judicial decree of divestiture with which the defendants have complied. The line beyond which Congress may not constitutionally pass must be drawn by judicial action, not the action of private parties. That line was drawn in this case by the district court's final judgment of divestiture.[11]

Rejecting appellant's argument on this point, the district court relied upon two cases: *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), and *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940) (App. B, *infra*, p. 8a). Both cases are distinguishable.

In *Wheeling Bridge* the Court had previously held that a bridge constituted an unlawful obstruction of interstate commerce and had ordered that the obstruction be abated. Thereafter, Congress passed a statute validating the bridge. The Court declined to enforce its decree, stating (59 U.S. at 432)—

> Suppose the decree had been executed, and after that the passage of the law in question, can it be doubted but that the defendants would have had a right to reconstruct it [the bridge]? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?

Enforcement of the Court's decree, in short, would have been futile because of the new statute. And the

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[11] Even in cases involving money judgments the power of the legislature to affect the judgments depends not upon whether they have been satisfied, but upon whether the last judicial act or event requisite to their finality has occurred. *E.g.*, *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948).

court therefore properly declined, in its discretion, to enforce the decree and insist upon a useless act.

No comparable problem exists here. The Bank Merger Act, unlike the statute in *Wheeling Bridge*, does not validate all future bank mergers. If Section 2(a) of the Bank Merger Act is declared unconstitutional as applied to the combination here, and the March 18, 1965, divestiture decree is accordingly reinstated, that will be the end of the matter. Any subsequent consolidation by First National and Security Trust would be adjudicated under the substantive standards of the antitrust laws—"Congress intended bank mergers first to be subject to the usual antitrust analysis"—as supplemented by the Bank Merger Act. *United States* v. *Third Nat'l Bank in Nashville*, No. 86, O.T. 1967, slip op. 10 (March 4, 1968). Therefore, the principles of *Wheeling Bridge* do not require vacation of the March 1965 divestiture decree.[12]

Paramino Lumber involved an administrative award of compensation for injuries. After the award became final, Congress passed a statute ordering the administrative agency to review the case "and to issue a new order" providing additional compensation for newly

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[12] This Court recently, in *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), interpreted *Wheeling Bridge* as involving a proper application of *judicial discretion* not to enforce an outstanding decree. The Court in *Wright* ruled that the lower court had abused its discretion in refusing to modify a judicial decree prohibiting a union shop after Congress passed a statute permitting union shops. The Court stated that the lower court's inherent power to modify an outstanding decree was not in issue, citing *Wheeling Bridge*. 364 U.S. at 646. And it relied upon "[t]he principles of the *Wheeling Bridge* case . . ." to hold that the lower court erred in not exercising its discretion to modify the particular decree there involved. *Id.* at 650.

discovered permanent injuries. 309 U.S. at 375. This court upheld the statute as constitutional, ruling that by extending the time for filing claims before the agency, Congress merely "cure[d] a defect in administration. . . ." *Id.* at 378.

The Court was careful to point out in *Paramino Lumber,* however, that "[t]his private act does not set aside a judgment. . . ." *Ibid.* Section 2(a) of the Bank Merger Act, by contrast, sets aside a final judicial judgment and is therefore unconstitutional.

CONCLUSION

This appeal presents substantial questions of public importance. Probable jurisdiction should be noted.

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